CENTRAL INTELLIGENCE AGENCY

OFFICE OF THE DEPUTY DIRECTOR

3/6/65

OGC:

Please stay on top of
This so we are not
suddenly confronted with a
proposal or amendment that
would hamper us — and —
Investigate to see if it might
be possible to arrange an
amendment which would introduce
provisions of an "Official Secrets Act"
for those who clearly violate
security!!

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MEMORANDUM FOR: Deputy Director of Central Intelligence

SUBJECT: Freedom of Information Bills (H.R. 5012 and S. 1160)

1. This memorandum is for information only.

2. Representative John E. Moss (D., Calif.) introduced H.R. 5012 on 17 February 1965 to amend the so-called "housekeeping" statute (5 U.S.C. 22). Nine members joined Mr. Moss and introduced similar measures. The bills were referred to the Government Operations Committee and will be considered by the Information Subcommittee, chaired by Mr. Moss. On the same day, Senator Edward V. Long (D., Mo.), along with 17 co-sponsors, introduced S. 1160 to amend the "public information" section of the Administrative Procedure Act of 1946 (5 U.S.C. 1002). This bill was referred to the Judiciary Committee and will be considered by the Administrative Practice and Procedure Subcommittee, chaired by Senator Long.

Background - H.R. 5012.

3. Over the years, agency heads have successfully contended that they possess what amounts to a constitutional privilege and discretion to determine what papers and information should be disclosed in the public interest. While this privilege does not extend to subordinates, regulations limiting the subordinates' authority to disclose have been issued to assure that the department heads' privilege is not undermined. This also protects the subordinate from being forced to make disclosures under subpoena.

4. Up to 1958, the most frequently cited authority for issuing such regulations was the so-called "housekeeping" statute." This statute was passed during President Washington's administration and granted department heads the authority to issue regulations for the administration of their departments, including regulations dealing with "custody, use and preservation of... records, papers...appertaining" to the department. Independent agencies construed that this authority applied to them also.

5. Congress, strongly backed by the press, felt that this purely "housekeeping" statute was being incorrectly cited as an authority to withhold information. Therefore, in 1958, the statute was amended to prevent it from being used as a basis for issuing regulations which "authorize withholding information from the public or limiting the availability of records to the public." This amendment was pressed by its sponsors (Congressman Moss and his Subcommittee staff) as a first small step in increasing the amount of governmental information in the public domain. It was recognized only as a first step because:

(a) it created no enforcible right in the public to obtain Government information;

(b) it in no way infringed upon the 78 statutory authorities which specifically authorized information to be withheld at that time; and

(c) it did not deal with the question of the inherent constitutional privilege of agency heads to withhold information in the public interest."

The successful passage of the 1958 amendment was the culmination of a lengthy effort and built up a national reputation for Congressman Moss and his Subcommittee as protectors of the public and the press against "recalcitrant bureaucracy."

6. Purpose of H.R. 5012.

(a) As previously noted, the 1958 amendment did not promulgate a positive right for the public to obtain information. H.R. 5012 is an attempt to remedy this situation and is a logical follow up to the 1958 amendment. The three key elements of H.R. 5012 are:

(1) to vest the public with a right to "public" information;

(2) to statutorily delineate what constitutes "public" information; and

(3) to provide legal redress for a complainant from whom such records are wrongfully withheld.

(b) This purpose is accomplished in the following ways: First, it lays at rest any questions as to what is the positive right of the public to records and information, by providing that every agency shall make all its records promptly available to any person. Second, it backs up

this right by providing that a complainant may go to district court to order the production of any agency records or information improperly withheld. The burden is placed on the agency to sustain its "withholding" action, and provisions are made for expediting the court action. Non-compliance with a court order is punishable by contempt. Third, it defines what constitutes "public information" as all matters not specifically excepted. By so doing, it authorizes eight exceptions. The matters excepted are those that are:

> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of any agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential;
>
> (5) interagency or intra-agency memoranda or letters dealing solely with matters of law or policy;
>
> (6) personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

Fourth, to assure that non-disclosure by an agency shall not be based on any authority other than the eight exceptions, Section 2 of the bill repeals all laws or parts of laws inconsistent with the amendment.

Background - S. 1160.

7. Up to the time of the passage of the Administrative Procedure Act of 1946 (5 U.S.C. 1002), the only general statute under which agencies could publish regulations dealing with the disclosure of information was the "housekeeping" statute referred to earlier. With the enactment of

Section 3 of the Administrative Procedure Act, additional general rules on disclosure and non-disclosure were statutorily prescribed.

8. Coverage. The Administrative Procedure Act of 1946 lays down uniform rules of practice and procedure for the quasi-legislative and quasi-judicial functions of agencies. Regulating agencies is its primary concern; however, it is a statute of general applicability and no agency is granted exception from its scope. To grant public access to the decision-making process and policies being followed in the field of administrative law, the Act contains a public information section (Section 3) requiring certain disclosures. These disclosures concern an agency's central and field organization, its rules, opinions and orders, and its records.

9. Exclusions. The Act provides two general exclusions to the above public information requirements. The first has to do with any function of the United States requiring secrecy in the public interest, and the second with any matter relating solely to the internal management of an agency. Further exemptions to the disclosure rules are granted to opinions and orders if for good cause they are to be held confidential, and to agency records which should be held confidential for good cause found with a further requirement that the interested party must be properly and directly concerned.

10. Senator Long and other proponents for amending the public information section of the Administrative Procedure Act, feel that the Act is seriously deficient in the following respects:

(a) There is no delimitation on what the phrase "in the public interest" means. When exclusions are based on secrecy, there is no authority for reviewing a Federal official's interpretation of what that phrase means.

(b) The exemption granted in the case of opinions or orders because they are "required for good cause to be held confidential" is an almost unlimited out for officials who do not want to make a disclosure.

(c) The exemption granted in the case of agency records provides a double-barreled loophole because such records can be held confidential "for good cause found" and the records can only be requested by persons "properly and directly concerned."

(d) There is no remedy in case of wrongful withholding of information from the public by Government officials.

That there is widespread agreement in the Senate that these are deficiencies is underscored by the Senate's unanimous passage in the 88th Congress of a similar bill by Senator Long. Also, the Moss Subcommittee in the House is presently accumulating information in connection with the public information section of the Act.

Purpose - S. 1160.

11. The changes made in the public information section of the Administrative Procedure Act by S. 1160 are similar to those made by H.R. 5012 in the "housekeeping" statute. S. 1160 is of general applicability to all agencies, provides an aggrieved citizen a remedy in court, and exempts from the scope of the amendment the same eight Governmental matters which are exempted by H.R. 5012.

12. An interesting side feature of S. 1160 is Section 3(f), which states, "Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress." The supplied underlining is interpreted as being a statement of Congressional philosophy that Congress, as elected representatives of the public, have a right which is superior to that of the public to obtain Government information. The provision has been inserted to assure that the amendment would in no way diminish Congress's inherent right to obtain information from the Executive, but it is not viewed as changing the right as it now exists.

13. Effect on Agency - H.R. 5012. The attempt to make 5 U.S.C. 22 into a positive law concerning the right of the public to information does not appear to change the Agency's present authority and responsibility of maintaining its general policy of non-disclosure. Agency activities seem to be clearly exempted from the provisions of the bill by the exceptions spelled out in the bill. By far the most important exception deals with matters that are "specifically exempted from disclosure by statute." Thus, there remain undisturbed the provisions of the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, holding the DCI "responsible for protecting intelligence sources and methods from unauthorized disclosure" and exempting the Agency from the "provisions of any law which requires the publication or disclosure of the organization, functions, names, official titles..." (Sections 102 (d)(3) and (6), respectively). As a further buffer, Executive order 10501 authorizes the Agency to classify information and material and prohibits further dissemination without the approval of the originating agency or department. The bill excepts matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."

14. Effect on Agency - S. 1160. Since the Agency has no quasi-judicial or legislative authority, as such, the Agency does not fall within the intended and practical scope of the Act. The Agency's dealings with the public in a rule-making or adjudicatory capacity are limited to its own employees and its procurement activities. With respect to employees, the bill specifically excludes "internal Personnel rules and practices" and the Agency has specific statutory authority for non-disclosure in this area. With respect to procurement, the bill makes no changes in disclosures relating to the Agency's procurement activities.

15. Conclusion. The passage of H.R. 5012 and S. 1160 would not in any foreseeable way affect the Agency's authority to maintain its present non-disclosure policy.

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Legislative Counsel

Attachments

TRANSMITTAL SLIP	DATE 8 March 1965
TO: DDCI	
ROOM NO.	BUILDING
REMARKS:	
FROM:	
ROOM NO.	BUILDING / EXTENSION

FORM NO. 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. ☆ GPO : 1957—O-439445 (47)